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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

2-WAY COMPUTING, INC.,

Plaintiff,

v.

SPRINT NEXTEL CORPORATION  
and SPRINT SOLUTIONS, INC.,

Defendants.

2:11-CV-12 JCM (PAL)

**ORDER**

Presently before the court is defendants' objections pursuant to local rule IB 3-1, or, alternatively, motion for district judge to reconsider order by the magistrate judge. (Doc. # 105). Plaintiff filed a response in opposition (doc. # 109), and defendants filed a reply (doc. # 118).

Also before the court is defendants' motion for summary judgment for invalidity of claims. (Doc. # 106). Plaintiff filed a response in opposition (doc. # 111), and defendants filed a reply (doc. # 116).

Also before the court are plaintiff's objections pursuant to local rule IB 3-1, or alternatively, motion for district judge to reconsider order by the magistrate judge. (Doc. # 107). Defendants filed a response in opposition (doc. # 110), and plaintiff filed a reply (doc. # 117).

**I. Factual Background**

The pending motions do not focus on the factual background of this case. Therefore, an abbreviated factual background is all that is necessary.

1           The patent at issue is U.S. patent number 5,434,797 entitled “Audio Communication System  
2 for a Computer and Network” (the “797 patent”). Robert Barris is named as the inventor of the 797  
3 patent. Plaintiff filed the application for the patent that was ultimately issued as the 797 patent on  
4 June 15, 1992. The Patent Office initially rejected the claims. Plaintiff amended some of the claims  
5 to address the rejection. The Patent Office issued plaintiff a notice of allowability on January 24,  
6 1995, and the 797 patent was issued on July 18, 1995.

7           On October 25, 2005, plaintiff initiated an ex parte reexamination request that the Patent  
8 Office reevaluate the patentability of all claims in light of additional prior art. The Patent Office  
9 granted the request for reexamination and sent confirmed the patentability of further claims, but  
10 rejected the remaining claims in view of certain prior art. Plaintiff amended some of the claims,  
11 added new claims, and submitted arguments explaining why it believed the claims were patentable  
12 in view of the cited prior art. The Patent Office again confirmed the patentability of some claims,  
13 but rejected other claims in light of certain prior art. The reexamination certificate was issued by the  
14 Patent Office on September 2, 2008.

15           Plaintiff describes the patent as disclosing an audio communication system that allows the  
16 user to talk with other users over a shared network, rather than having to rely on traditional telephone  
17 lines. The user can use a computer to place a call and continue to work on other applications and  
18 perform other tasks on the computer while the audio communication system is operating.

19           Plaintiff accuses defendant Sprint of infringing 23 of the 32 claims of the 797 patent by  
20 making, selling, importing and/or offering to sell audio communication products and/or services.  
21 Plaintiff accuses defendant Sprint of actively inducing others to infringe and contributing to others’  
22 infringement in violation of 35 U.S.C. § 271. Sprint counterclaimed and asserted the 797 patent is  
23 invalid and not infringed.

24           This court referred the parties’ claim construction dispute to the magistrate judge for a  
25 decision. The magistrate judge conducted a *Markman* hearing and later issued an order after the  
26 hearing. The parties’ objections to the magistrate judge’s order will be resolved by the court in this  
27 order.

## II. The Magistrate Judge's Order and the Parties' Objections

Magistrate Judge Leen interpreted and constructed the meaning of the following five claims: (1) audio responsive input unit; (2) audio data packets; (3) managing the operations of the audio communication system; (4) information to control the audio communication system; and, (5) arbitration value.

Magistrate Judge Leen interpreted and constructed three claims in favor of plaintiff and two in favor of defendants. Each party objects to each construction in favor of the other party. The court will address each party's objections in turn.

### A. *De Novo*

The parties agree that this court must review the magistrate judge's order *de novo*. A "district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *Innova Patent Licensing, LLC v. Alcatel-Lucent Holdings*, no. 2:10-cv-251, 2012 WL 2958231, at \*1 (E.D. Tex. July 19, 2012) ("Because claim construction is a matter of law, this Court can review a magistrate judge's claim construction *de novo*").

### B. *Claim Construction Standards*

"A two-step process is used in the analysis of patent infringement: first, the scope of the claims are determined as a matter of law, and second, the properly construed claims are compared to the allegedly infringing device to determine, as a matter of fact, whether all of the limitations of at least one claim are present, either literally or by a substantial equivalent, in the accused device." *Teleflex, Inc. v. Ficosa North America Corp.*, 299 F.3d 1313, 1323 (Fed. Cir. 2002). The first step is done by the court and the second step is done by the fact finder. *Id.*

"The claims define the scope of the right to exclude; the claim construction inquiry, therefore, begins and ends in all cases with the actual words of the claim." *Id.* (quoting *Renishaw PLC v. Marposs Societa per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998)). "The language of the claim frames and ultimately resolves all issues of claim interpretation." *Id.*

"The words used in the claims are interpreted in light of intrinsic evidence of record, including the written description, the drawings, and the prosecution history, if in evidence." *Id.*

1 “Such intrinsic evidence is the most significant source of the legally operative meaning of disputed  
2 claim language.” *Vidtronics Corp v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

3 When considering the intrinsic evidence, courts first indulge a “‘heavy presumption’ that a  
4 claim term carries its ordinary and customary meaning.” *Teleflex*, 299 F.3d at 1325. “[T]he ordinary  
5 meaning must be determined from the standpoint of a person of ordinary skill in the relevant art.”  
6 *Id.* “[A] court may constrict the ordinary meaning of a claim term in at least one of four ways”:

7  
8 1) “the claim term will not receive its ordinary meaning if the patentee acted as his own  
9 lexicographer and clearly set forth a definition of the disputed claim term in either the  
specification or prosecution history”;

10 2) “a claim term will not carry its ordinary meaning if the intrinsic evidence shows that the  
11 patentee distinguished that term from prior art on the basis of a particular embodiment,  
expressly disclaimed subject matter, or described a particular embodiment as important to  
the invention”;

12 3) “a claim term also will not have its ordinary meaning if the term chosen by the patentee  
13 so deprives the claim of clarity as to require resort to the other intrinsic evidence for a  
definite meaning”;

14 4) “a claim term will cover nothing more than the corresponding structure or step disclosed  
15 in the specification, as well as equivalents thereto, if the patentee phrased the claim in step-  
or means-plus-function format.”

16  
17 *CCS Fitness, Inc., v. Brunswick Corp.*, 288 F.3d 1359, 1366-67 (Fed. Cir. 2002) (internal citations,  
18 alterations, and quotations omitted).

19 Second, among intrinsic evidence, “the specification is always highly relevant to the claim  
20 construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a  
21 disputed term.” *Id.* (quoting *Vidtronics*, 90 F.3d at 1582). “[I]t is always necessary to review the  
22 specification to determine whether the inventor has used any terms in a manner inconsistent with  
23 their ordinary meaning.” *Vidtronics*, 90 F.3d at 1582. “The specification contains a written  
24 description of the invention which must be clear and complete enough to enable those of ordinary  
25 skill in the art to make and use it.” *Id.*

26 Third, “the prosecution history may demonstrate that the patentee intended to deviate from  
27 a term’s ordinary and accustomed meaning, i.e., if it shows the applicant characterized the invention  
28

1 using words or expressions of manifest exclusion or restriction during the administrative proceedings  
 2 before the Patent and Trademark Office.” *Teleflex*, 299 F.3d at 1326.

3 “In most situations, an analysis of the intrinsic evidence alone will resolve any ambiguity in  
 4 a disputed term.” *Id.* “In such circumstances, it is improper to rely on extrinsic evidence.” *Id.*  
 5 Extrinsic evidence may be considered only “if needed to assist in determining the meaning or scope  
 6 of technical terms in the claims.” *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1216 (Fed.  
 7 Cir. 1995).

### 8 C. Defendants’ Objections

9 The defendants objected to the magistrate judge’s construction of the following three terms:  
 10 (1) audio data packets; (2) managing the operations of the audio communication system; and, (3)  
 11 arbitration value.<sup>1</sup> The court will address each in turn.

#### 12 I. Audio Data Packets

13 The magistrate judge adopted plaintiff’s proposed construction of the “audio data packets”  
 14 claim—“data structures that include status information and audio data.” In so construing this claim,  
 15 the magistrate judge found that the intrinsic evidence unambiguously defined this claim term, the  
 16 intrinsic evidence did not support defendants’ proposed limitations, defendants’ reliance on  
 17 plaintiff’s expert was misplaced, and, therefore, the court could not rely on extrinsic evidence of any  
 18 kind.

19 Defendants object under two theories. First, defendants make the same arguments that were  
 20 rejected by the magistrate judge in the first instance. Defendants argue that a patent specification  
 21 requires a limitation that the “audio data packets” construction include “separate defined fields for  
 22 the status information” because the specification states different types of data have different “fields.”

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 26 <sup>1</sup> Defendants also objected to the magistrate judge’s finding that it was premature to consider  
 27 whether the claims identified by Sprint are invalid as indefinite at the claim construction stage.  
 28 However, instead of arguing this decision by the magistrate judge in their objections, the defendants  
 filed a motion for summary judgment on the invalidity of certain claims.

1 This court, as did the magistrate judge, finds this argument unconvincing. This interpretation  
2 is not supported by the intrinsic evidence. Plaintiff did not act as its own lexicographer and redefine  
3 the term, nor did plaintiff disavow the full scope of the term in the specification or file history.  
4 Nothing in the passage relied upon by defendants<sup>2</sup> suggests that plaintiff redefined the term “audio  
5 data packets” to require that the audio data and status information must be kept in separate fields.

6 Second, defendants object and argue that this court should modify the magistrate judge’s  
7 construction as follows: “data structures that include status information, which includes an  
8 arbitration value and audio data.” Defendants base this argument in part on statements made by  
9 plaintiff at the *Markman* hearing and in part on the reasoning that the arbitration value must be  
10 included in the status information.

11 The court finds that defendants have taken quotes by counsel and examples provided in the  
12 specification out of context. The entirety of the intrinsic evidence does not support the modification  
13 advanced by defendants.

14 The court overrules the objection to the construction of “audio data packets.”

15 ii. Managing the Operations of the Audio Communication System

16 The magistrate judge found that the term “managing the operations of the audio  
17 communication system” required no construction and that the plain, ordinary meaning controls.

18 Defendants object by arguing that the ordinary meaning of “managing the operations” should  
19 be replaced with the following trio of functional requirements: (1) establishing a connection with  
20 other computer station(s); (2) determining when to enable audio input and output by receiving and  
21 comparing status information from other computer station(s); and, (3) performing arbitration.

22 This court simply agrees with the magistrate judge’s finding that “managing the operations”  
23 has a common sense and ordinary meaning. Defendants’ suggested trio of functional requirements

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25 <sup>2</sup> The pertinent passage in the specification reads: “A packet of data is a system defined data  
26 structure with a given storage capacity. The data packets of this system are defined to contain up to  
27 100 bytes of digital data. Out of the available 100 bytes of data, at least two bytes of data are defined  
28 as fields in each data packet to hold status information. The remaining 98 bytes are reserved for  
digital audio data.”

1 is not an ordinary and plain meaning and not otherwise supported by the remaining intrinsic  
2 evidence. The objection is overruled.

3           iii.     Arbitration Value

4           The magistrate judge constructed the claim term “arbitration value” as follows: “a value that  
5 is set for determining which transmission has priority.” Defendants object and argue this court  
6 should adopt the following construction—“an alphanumeric identifier for a computer station that is  
7 compared with at least one alphanumeric identifier from another computer station for determining  
8 which station’s transmission has priority.”

9           Defendants object for three reasons: (1) the arbitration value must be alphanumeric; (2) the  
10 arbitration value has to be tied to a particular station; and, (3) the prosecution history supports this  
11 construction.

12           When construing the claim, the magistrate judge found all of the following in support of the  
13 construction: (1) nothing in the patent, specification, or prosecution history suggests that the  
14 arbitration value must be an alphanumeric value or associated with a specific computer station; (2)  
15 the examples relied on by defendants from the specification merely describe an embodiment or  
16 example of the arbitration value; and, (3) the examples do not import the limitation proposed by  
17 defendants.

18           Defendants objections are simply the same arguments made to the magistrate judge in the  
19 first instance at the *Markman* hearing. This court agrees with the construction and the reasoning of  
20 the magistrate judge. The objection is overruled.

21           D.     Plaintiff’s Objections

22           The plaintiff objects to the magistrate judge’s construction of the following two claim terms:  
23 (1) audio responsive input unit; and, (2) information to control the audio communication system.  
24 The court will address each objection in turn.

25           I.     Audio Responsive Input Unit

26           The magistrate judge constructed the claim “audio responsive input unit” as follows: “unit  
27 that receives audio input without delay caused by the computer station sending a request to talk and  
28

1 waiting for a reply.” This was the defendants’ proposed construction. The magistrate judge declined  
2 to adopt the defendants’ first recommended construction finding that the defendants had not  
3 established that either the specification or the prosecution history met the Federal Circuit’s exacting  
4 standard for disavowal. However, after the *Markman* hearing, defendants’ proposed the alternative  
5 claim construction ultimately adopted by the magistrate judge.<sup>3</sup> In adopting the alternative proposed  
6 construction, the magistrate judge found that the inventor disparaged in the prior art the delay caused  
7 by the request/reply handshake and the inability to multi-task during audio communications.

8 The basic disagreement is whether the construction provides meaning for the term  
9 “responsive.”

10 The court finds two of plaintiff’s objections persuasive. First, the disparagement by the  
11 inventor of the prior art was “the significant delay between when one user speaks and another user  
12 receives the voice communication.” The limitation that became part of the magistrate judge’s  
13 construction was the “delay caused by the computer station sending a request to talk and waiting for  
14 a reply.”

15 To highlight this distinction, a slightly deeper delve into the facts and patent is necessary.  
16 The invention essentially allows the users of two computers to talk to each other while multi-tasking  
17 with other applications/operations on the computer. The invention allowed the users and computers  
18 to communicate through gapless delays. Additionally, the invention provided an arbitration to  
19 determine which computer could speak if both attempted to communicate with the other at the same  
20 time.

21 The computer of the user attempting to communicate with the user on the second computer  
22 sends out a signal and waits for the second computer to respond that it is ready and able to  
23 communicate. Plaintiff argues that this delay in prior art, if any, of the two computers to sync to  
24 communicate was the delay criticized in the claim construction. However, the delay actually

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26 <sup>3</sup> Plaintiff argues that it did not have the chance to oppose the merits of the alternative  
27 proposal. After reviewing the docket, this court finds that plaintiff made a tactical decision not to  
28 oppose the alternative construction proposal and not that plaintiff was actually precluded from  
opposing the alternative construction proposal.



1 disparaged by the inventor of the prior art was the delay between communications between the two  
2 users after the two computers have already synced. The court agrees that limitation in the  
3 construction was not consistent with the disparagement by the inventor.

4 Second, plaintiff argues that the criticized delay is only mild in nature and does not constitute  
5 a disavowal. Plaintiff argues that the specification says nothing about excluding from the claims all  
6 systems that incorporate delay. This court agrees that the disparagement is too mild to rise to the  
7 level of clear disavowal. *See Thorner v. Sony Computer Entm't America LLC*, 669 F.3d 1362, 1366  
8 (Fed. Cir. 2012) (“Mere criticism of a particular embodiment encompassed in the plain meaning of  
9 a claim term is not sufficient to rise to the level of clear disavowal.”). There was no expression of  
10 manifest exclusion or restriction as required.

11 The court finds that the ordinary and plain meaning controls and no construction is necessary.  
12 The claim “audio responsive input unit” is modified by the larger claim limitation “an audio  
13 responsive input unit which accepts analog audio waveform signals from the microphone and  
14 digitizes the audio waveform signals.” The plain meaning of a person familiar with the art would  
15 know the audio input unit is responsive in that it converts voice from analog to digital form.

16 The court finds the ordinary and plain language controls and the objections on this claim are  
17 granted.

18 ii. Information to Control the Audio Communication System

19 The magistrate judge constructed the claim “information to control the audio communication  
20 system” as follows: “information that permits the user to change the parameters of the audio  
21 communication system.” This was defendants’ proposed construction and plaintiff now objects. The  
22 magistrate adopted this construction because the defendants’ proposed construction is consistent with  
23 the prosecution history, the position taken by plaintiff during the reexamination of the 797 patent in  
24 2005, and plaintiff’s proposed ordinary meaning would have read the word “interface” out of the  
25 claim.

26 Plaintiff argues that its proposed ordinary meaning construction would have resolved all  
27 disputes by the parties and that “interface” would not have been read out of the claim.

1 This court finds that the magistrate judge properly relied on the prosecution history and  
2 adopts the magistrate judge's construction. The objections are overruled.

### 3 **III. Summary Judgment**

4 Finally defendants filed a motion for summary judgment moving this court to find certain  
5 claims are invalid for indefiniteness.

#### 6 *A. Legal Standard*

7 The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings,  
8 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
9 show that "there is no genuine issue as to any material fact and that the movant is entitled to a  
10 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
11 "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317,  
12 323–24 (1986).

13 In determining summary judgment, a court applies a burden-shifting analysis. "When the  
14 party moving for summary judgment would bear the burden of proof at trial, it must come forward  
15 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.  
16 In such a case, the moving party has the initial burden of establishing the absence of a genuine issue  
17 of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213  
18 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

19 In contrast, when the nonmoving party bears the burden of proving the claim or defense, the  
20 moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
21 element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to  
22 make a showing sufficient to establish an element essential to that party's case on which that party  
23 will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party  
24 fails to meet its initial burden, summary judgment must be denied and the court need not consider  
25 the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

26 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
27 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
28

1 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing  
 2 party need not establish a material issue of fact conclusively in its favor. It is sufficient that “the  
 3 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions  
 4 of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 631 (9th  
 5 Cir. 1987).

6 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
 7 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045  
 8 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
 9 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
 10 for trial. *See Celotex Corp.*, 477 U.S. at 324.

11 At summary judgment, a court’s function is not to weigh the evidence and determine the  
 12 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*,  
 13 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all justifiable  
 14 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
 15 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
 16 249–50.

#### 17 B. Indefiniteness Legal Standard

18 “[P]roof of indefiniteness must meet ‘an exacting standard.’” *Haemonetics Corp. v. Baxter*  
 19 *Healthcare Corp.*, 607 F.3d 776, 783 (Fed. Cir. 2010) (quoting *Halliburton Energy Servs., Inc. v.*  
 20 *M-I LLC*, 514 F.3d 1244, 1249 (Fed. Cir. 2008). “Only claims not amendable to construction or  
 21 insolubly ambiguous are indefinite.” *Id.* “A claim is not indefinite merely because parties disagree  
 22 concerning its construction. An accused infringer must thus demonstrate by clear and convincing  
 23 evidence that one of ordinary skill in the relevant art could not discern the boundaries of the claim  
 24 based on the claim language, the specification, the prosecution history, and the knowledge in the  
 25 relevant art.” *Id.*

26 “If the meaning of the claim is discernable, even though the task may be formidable and the  
 27 conclusion may be one over which reasonable persons will disagree, [the Federal Circuit has] held  
 28

1 the claim sufficiently clear to avoid invalidity on indefiniteness grounds.” *Honeywell Intern., Inc.*  
2 *v. U.S.*, 609 F.3d 1292, 1302 (Fed. Cir. 2010).

3 C. Discussion

4 I. Actively Executing

5 Defendants argue that claims 1, 6, 17, and 30-32 are invalid as indefinite because they are  
6 hybrid claims that recite both an apparatus and a method of using that apparatus. *See* 35 U.S.C. §  
7 112, ¶ 2; *IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005). Defendants  
8 argue that these claims that recite the phrase “actively executing” are indefinite because the claim  
9 recites a system and a method for using that system.

10 Plaintiff distinguishes *IPXL Holdings* and then argues that it is entirely appropriate for an  
11 apparatus claim to include functional language describing how the apparatus operates. Plaintiff  
12 argues that claim simply describes the functional capabilities of the computer station controller while  
13 other application programs are actively executing.

14 The court agrees with plaintiff. Claims that use functional language to describe the  
15 capabilities of the claimed apparatus are not impermissible mixed method apparatus claims and are  
16 understood to one of ordinary skill in the art.

17 ii. Computer Station Controller

18 Defendants argue that claim 17 (from which claims 18-20 depend) is indefinite because it  
19 cites two computer station controllers, but does not clearly state which of these two computer station  
20 controllers is the “said computer station controller” that must be configured in the stated way or  
21 perform the stated function. Defendants argue that this is an error in the claim language and the  
22 specification suggests at least two possible reasonable correction could be proper and it is not  
23 apparent which would be the proper construction.

24 Plaintiff argues that claim 17 contains a simple typographical error because it recites “a  
25 computer station controller” but then later refers back to the computer station controller as “a”  
26 computer station controller instead of “said” computer station controller. Plaintiff argues that this  
27 is evidence that claim 17 refers to a single computer station.  
28

1 A district court may correct a patent only if: “(1) the correction is not subject to reasonable  
2 debate based on consideration of the claim language and the specification and (2) the prosecution  
3 history does not suggest a different interpretation of the claims.” *Novo Indus., L.P., v. Micro Molds*  
4 *Corp.*, 350 F.3d 1348, 1354 (Fed. Cir. 2003).

5 For the first prong, the court finds that the claim language and the specification leave no  
6 room for reasonable debate that claim 17 refers to a single computer station controller. This is so  
7 because claim 17 calls for a computer station controller that is coupled to a computer station network  
8 interface. Claim 17 later calls for a computer station controller that is in communication with the  
9 audio responsive input unit, audio output unit, and mass data storage system. One of ordinary skill  
10 in the art would have understood that the computer station controller in communication with the  
11 audio responsive input unit, audio output unit, and mass data storage system must be the same  
12 computer station controller that is coupled to a computer station network interface.

13 Under the second prong, the court finds the prosecution history does not suggest any other  
14 interpretation.

15 iii. Said Station Network Interface and to Transfer Said Audio Data Packets to  
16 Said Audio Output Unit

17 This phrase appears in claim 30 and defendants argue it is indefinite because it is impossible  
18 to discern the scope of such a truncated limitation. Defendants also argue that the court should not  
19 correct any error because a reader of the patent cannot tell from the face of the patent what the error  
20 may be.

21 Plaintiff provides for the court the entire text of claim 30. When this phrase is considered  
22 along with the language of claim 30 in full, it has much more meaning. Additionally, when  
23 considered with the entire text of claim 30, it becomes apparent that this phrase was inadvertently  
24 repeated twice in the file history because it appeared in full at the bottom of one page and then  
25 appeared in full again at the top of the following page.

26 The court finds that one in ordinary skill in the art would obviously conclude that the  
27 repeated language occurred in error.

1 The court can fix this error by striking the inadvertently repeated claim language. *Hoffer v.*  
2 *Microsoft Corp.*, 405 F.3d 1326, 1331 (Fed. Cir. 2005) (“Here the error was apparent from the face  
3 of the patent, and that view is not contradicted by the prosecution history.”). Here, as in *Hoffer*, the  
4 defendants do not argue that they were prejudiced or even confused by the error. The court strikes  
5 the typographical mistake and will not invalidate the patent based on a simple and unmistakable  
6 typographical mistake.

7 Accordingly,

8 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants’ objections  
9 pursuant to local rule IB 3-1 or, alternatively, motion for district judge to reconsider order (doc. #  
10 105) be, and the same hereby, is OVERRULED and DENIED.

11 IT IS FURTHER ORDERED that defendants’ motion for summary judgment for invalidity  
12 of certain claims (doc. # 106) be, and the same hereby, is DENIED.

13 IT IS FURTHER ORDERED that plaintiff’s objections pursuant to local rule IB 3-1 or,  
14 alternatively, motion for district judge to reconsider order (doc. # 107) be, and the same hereby, is  
15 GRANTED in part and DENIED in part consistent with the foregoing.

16 DATED May 17, 2013.

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19 UNITED STATES DISTRICT JUDGE  
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